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FILED
AUG 25 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 299.

CHARLES F. HEMANS, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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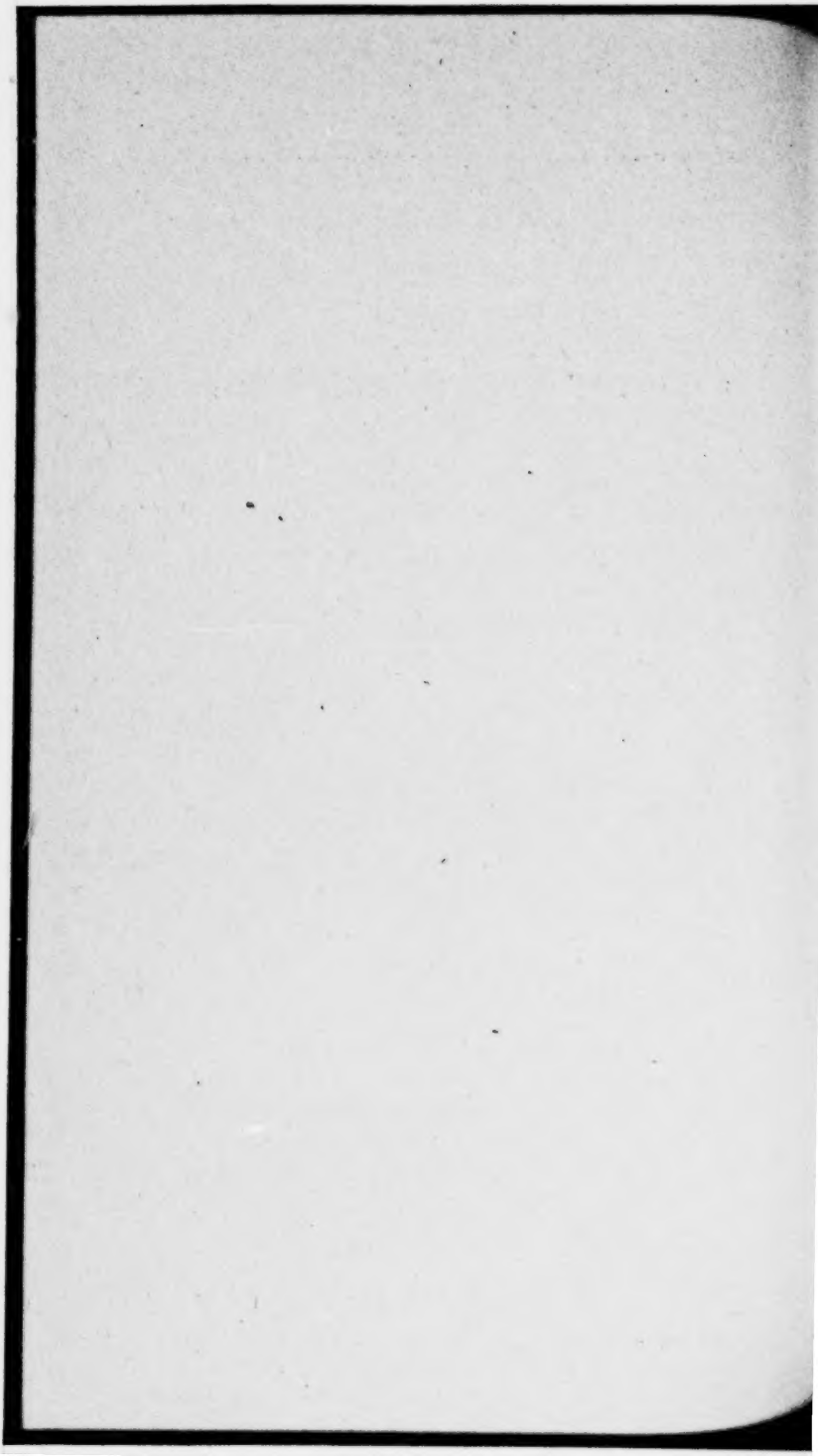

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IN THE

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No. ———.

CHARLES F. HEMANS, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice of the United States, and to the Honorable, the Associate Justices of the Supreme Court of the United States:

The petitioner above named seeks, under Title 28, Section 347, U. S. Code, and 37(b) of the Federal Rules of Criminal Procedure, a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment filed July 28, 1947 (R. 100) affirming the

conviction and sentence of the petitioner as a fleeing witness under Title 18, Section 408(e)(2), U. S. Code, otherwise known as the Fugitive Felon Act, in the District Court of the United States for the Eastern District of Michigan to a term of four years and the payment of a fine of One Thousand ($1,000.00) Dollars. (R. 24, 25). The matter is one of first impression in this Court.

STATEMENT OF THE CASE.

The indictment filed September 16, 1946 (R. 1, 2) charged the petitioner with having violated Title 18, Section 408(e), U. S. Code, in that he moved and traveled in interstate commerce from the County of Ingham, in the Eastern District of Michigan, to the City of Washington, District of Columbia, with intent to avoid giving testimony in a criminal proceeding then pending in the Circuit Court for Ingham County, Michigan, wherein the commission of a felony is charged, the said criminal proceeding being entitled *State of Michigan* v. *Simon Den Uyl, et al,* and in which criminal proceeding a preliminary examination was set to commence on September 10, 1946 in the Circuit Court for the County of Ingham.

A motion to dismiss the indictment was filed on the ground that it was void because it failed to charge an offense within the purview of Title 18, Section 408(e), U. S. Code, and on the further ground that said Title 18, Section 408(e)(2), U. S. Code is contrary to the Constitution of the United States. (R. 4). This motion was denied by the trial court (R. 5) and the case went to trial before the court and a jury.

The trial court instructed the jury as a matter of law that at the time the travel was performed there was a criminal proceeding pending "in the State of Michigan, which proceeding meets the description of the one described in the indictment" (R. 19). The trial court further instructed the jury as a matter of law that this criminal proceeding described in the indictment charged the commission of a

felony (R. 19). The petitioner had requested contrary instructions (R. 89, 90).

The travel in question was admitted. After the trial court's instructions in this respect, all that remained for the jury to determine was the question of the intent of petitioner when he performed the travel. The evidence on this point was conflicting and the trial court charged the jury with respect thereto as follows:

> "There is evidence here that the defendant left Michigan to go to Chicago and then to Washington on private business matters. But, if you find that there were several reasons for his leaving Michigan on or about August 25, 1946, and if you also find beyond a reasonable doubt that one of the purposes for his leaving Michigan was to avoid giving testimony in the criminal proceeding described in the indictment in this case, knowing that he was wanted as a witness therein, then you must find that he did in fact leave the State of Michigan with the intent of avoiding giving evidence in that proceeding". (R. 20).

The jury returned a verdict of guilty (R. 24) and after a plea for mercy (R. 91, 92), the petitioner was sentenced December 10, 1946, to serve a term of four years in prison and to pay a fine of $1,000.00 (R. 25). Bail pending appeal was denied (R. 93, 98) and was also denied by both the Sixth Circuit Court of Appeals (R. 100) and by the Presiding Justice of that Circuit. The petitioner is now serving his sentence in the Lewisburg penitentiary.

Notice of appeal was filed on December 10, 1946, date of the sentence (R. 26) for reasons stated in the Points of Appeal (R. 27, 28) and the case was briefed for petitioner and argued on the basis thereof. Copies of the briefs for petitioner and for the respondent have been deposited with the clerk of this Court.

After the petitioner had filed on January 9, 1947, his designation of record on appeal (R. 30, 31) and the record had been prepared accordingly, the respondent filed on February 10, 1947, supplemental designation of record (R. 32) in

which it required that there be included in the record testimony of prosecuting witnesses, except in one instance of the clerk of Ingham County Circuit Court who had been called as a witness for petitioner and who testified, in effect, that no such case as the one described in the indictment had been placed on the dockets of his office on or before September 16, 1946, when the indictment was obtained in the court below (R. 72), though he did testify that some papers relating to the matter had been placed in a vault in the Lansing branch of his office to which both the grand juror and the prosecuting attorney had access (R. 75, 76).

It was admitted by the grand juror judge, who was a prosecuting witness, that he had in *his* possession certain of the papers from July 17 to September 10, 1946 (R. 38) and that no subpoena had been served on petitioner to appear and testify before the examining magistrate (R. 43). This grand juror stated in his testimony that the grand juror subpoena (R. 40, 43) served on Mr. Hemans:

> " * * does not require the presence of the same Charles F. Hemans to appear before Circuit Judge O'Hara, or any other officer sitting as Examining Magistrate, or appear as a witness in the Circuit Court for these cases on trial". (R. 42, 43).

No witness subpoena to appear either before the Examining Magistrate or the Circuit Court for Ingham County in the trial of the cases—if the Examining Magistrate should ultimately find and determine that there is probable cause and binds the several defendants or any of them over to the Circuit Court for trial—was ever served on the petitioner (R. 66), though petitioner notified the prosecutor several days before leaving Michigan to perform this travel that he intended to leave Michigan and go to Chicago and to Washington on private business of his own (R. 43, 66).

At the time of this telephone conversation the prosecutor admitted he got the impression that petitioner was going to Chicago and thence to Washington in order to get his resignation accepted as a Major in the United States Army on

inactive status (R. 66), hostilities then having ceased. When this prosecutor got to Washington some weeks thereafter in an effort to induce petitioner to voluntarily return and testify before the Examining Magistrate, to whom the warrant had been assigned for preliminary hearing (R. 39), the petitioner exhibited to the prosecutor the acceptance of his resignation from his Commission in the Army obtained after he reached Washington (R. 59).

This prosecutor had prior thereto corresponded with Army authorities about the possibility of having certain board proceedings against the petitioner dropped if petitioner resigned from the Army (R. 65, 66). The prosecuting attorney was informed that they would be dropped (R. 65) but when petitioner went to Chicago to resign, he was informed by the officer in charge that the resignation would have to contain reference to the pending board proceedings (R. 71). The petitioner declined to submit his resignation in that form and went on to Washington (R. 71) where the resignation was submitted and accepted as above stated.

Petitioner had theretofore resigned as a member of the Michigan Bar (R. 49) and as to the Army, the prosecuting grand juror witness testified that "there was a proceeding pending against petitioner. I think a court martial proceeding" (R. 50). These proceedings in both the State Bar and in the Army arose out of the fact that the petitioner "had testified at various trials of accepting money and bribing public officials." (R. 50).

Having testified in previous cases as a witness for the State in criminal cases, petitioner became unhappy at the abuse heaped upon him (R. 60); objected to the procedure followed by the grand juror, in whose office he had been employed (R. 46) and refused to return to Michigan and testify again for the State in this particular case. Upon his refusal to do so, this Federal indictment followed almost immediately after the return of State Prosecutors Foster and Cummins to Michigan.

STATUTES INVOLVED.

The Federal statute involved is the above cited Title 18, Section 408(e), U. S. Code and particularly subsection 2 thereof, as follows:

> *"It shall be unlawful for any person to move or travel in interstate Commerce from any State, Territory, or possession of the United States, or the District of Columbia, with intent either* (1) to avoid prosecution for murder, kidnapping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing, under the laws of the place from which he flees, or (2) *to avoid giving testimony in any criminal proceedings in such place in which the commission of a felony is charged.* Any person who violates the provisions of this section shall, upon conviction thereof, be punished by a fine of not more than $5000 or by imprisonment for not longer than five years, or by both such fine and imprisonment. Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed." (Italics mine).

The second statute involved is section 505 of Act 328, Michigan Statutes, 1931 (Section 28.773, Michigan Statutes Annotated), under which the one-man grand juror warrant was issued, in the preliminary examination of which the testimony of petitioner is desired. Said statute is as follows:

> *"Any person who shall commit any indictable offense at the common law,* for the punishment of which no provision is expressly made by any statute of this State, *shall be guilty of a felony,* punishable by imprisonment in the State Prison for not more than five (5) years or by a fine of not more than two thousand five hundred ($2,500) dollars." (Italics mine).

JURISDICTION.

The jurisdiction of this Court to grant the writ of certiorari in this case is contained in Title 28, Section 347,

U. S. Code and 37(b) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

The questions presented are the points stated in the record on appeal to the court below (R. 27, 28) and for purpose of consideration here may be restated and summarized as follows:

I.

Is the fleeing witness provision of the Fugitive Felon Act (subsection 2, Section 408(e), Title 18, U. S. Code) in conflict with either or all of the following provisions of the Constitution of the United States:

1. The Due Process Clause of the Fifth Amendment?
2. The Sixth Amendment?
3. The Tenth Amendment?
4. Article IV, Section 2 of the Constitution, particularly the Privilege and Immunities Clause and the Extradition Clause thereof ?
5. The Eighth Amendment?
6. The prohibition against delegation of Federal legislative power to the States or to prosecuting officers thereof to determine what shall constitute crimes against the United States?

II.

May a person be convicted under subsection 2 of the Fugitive Felon Act for fleeing a jurisdiction to avoid testifying in a State criminal proceeding when the offense charged therein is not an indictable offense either under statutes of said State or at the common law?

III.

Is the Michigan conspiracy statute, the above quoted Section 28.773, Michigan Statutes Annotated, so indefinite and uncertain that it is in conflict with the Fourteenth Amendment to the Constitution of the United States and, therefore, void, affording no basis whatever for the State criminal proceeding described in the Federal indictment?

IV.

May there be a crime of conspiracy committed by a plurality of bribe givers and a plurality of bribe takers as charged in this State warrant forming the basis of the proceeding in the State of Michigan when there is no specific statute therefor and when specific Michigan statutes respectively provide for punishment of bribe givers and of bribe takers?

V.

Is there in law a criminal proceeding pending in the State Court, as alleged in the indictment in which a felony is charged and as the trial court instructed the jury and approved by the Court below?

VI.

May a valid Federal Criminal Statute incorporate the criminal laws of the several States, territories and possessions of the United States as Subsection 2 of the Fugitive Felon Act attempts to do in the use of the phrase "* * * in such place in which the commission of a felony is charged" contrasted with Subsection 1 wherein specific crimes are enumerated?

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

I.

This is a criminal case of first impression, arising under the Fleeing Witness Provision of the Fugitive Felon Act (Title 18, Sec. 408(e) U. S. C.). Whether it is constitutional and valid is not only of vast importance to the criminal jurisprudence of the Federal government but it is of equal importance to the criminal jurisprudence of each of the 48 States, the territories and possessions of the United States.

The question has not been, but should be, settled by this court.

II.

This Fleeing Witness subsection 2 of the Fugitive Felon Act, by the use of the phrase "in such place in which the commission of a felony is charged", would incorporate in the Federal law for the purpose of making it a Federal crime for a witness to flee to avoid giving testimony in "any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this State", that is, of Michigan. The quoted terms being contained in the State statute on which the State criminal proceedings are based.

It is not believed that any such indefinite Federal criminal statute complies with the Due Process Clause of the Fifth Amendment, containing the definitness and certainty required by the Sixth Amendment to the Constitution of the United States.

Also, it is not believed that any such State criminal statute as this Section 28.773, Michigan Statutes Annotated, contains the definiteness and certainty required by the terms of the Fourteenth Amendment to the Constitution of the United States.

Compare:

United States v. *L. Cohen Grocery Company*, 255 U. S. 81
Lanzetta v. *New Jersey*, 306 U. S. 451
Champlin Refining Company v. *Oklahoma, etc.*, 286 U. S. 210
Connally v. *General Construction Company*, 269 U. S. 285
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United States v. *Chase*, 135 U. S. 255
United States v. *Reese*, 92 U. S. 214
Town of Conway v. *Lee*, (S. C. 1946), 38 S. E. (2), 914
State v. *Gaster*, 45 La. Ann., 636

III.

The exercise of the privilege and immunity contained in Article IV, Section 2 of the Constitution of the United States to free ingress, egress, and residence in any State, or the District of Columbia, of a person not charged with crime in the State from which he traveled may not itself be made a crime under Federal statute so as to deprive the citizen of such privilege and immunity.

There is a vast distinction between a person charged with crime in the State from which he fled to avoid prosecution in that State, or engaged in committing a crime while traveling, and a person traveling in interstate commerce who had not committed any crime in the State from which he fled to avoid giving testimony in a criminal proceeding in which the defendants are charged with none of the crimes enumerated in Subsection 1 of the Fugitive Felon Act and could not have been indicted thereunder even if they had fled the State jurisdiction to avoid prosecution in such State criminal proceeding.

It has not been heretofore determined by this Court, and should now be determined by it, whether an alleged fleeing witness, not even served with a witness subpoena to appear and testify in a State criminal proceeding before an examining magistrate, though there was ample opportunity to have done so, may be indicted in the Federal court, tried, convicted, and sentenced to a long term of four years in a penitentiary and fined $1000.00 for otherwise innocent travel in interstate commerce, even though the defendants in the particular State criminal proceeding, where such person was wanted as witness, could not have been indicted and convicted under Subsection 1 of the same Fugitive Felon Act. Also, at most, any refusal of the petitioner to testify in the State proceeding would constitute a contempt, only.

There are no precedents on the exact point. The nearest analagous one seems to be:

United States v. *Wheeler,* 254 U. S. 281,[1]

which supports our position that in the face of the Privilege and Immunities Clause the United States lacks constitutional power to enact such a statute as Subsection 2 of the Fugitive Felon Act here in question.

IV.

This Court has not, but should, determine whether a person who has committed no crime against a State for which he could be extradited under Article IV, Section 2 of the Constitution, nevertheless may be indicted and convicted under a Federal Statute for having left the State with the knowledge and implied consent of the State prosecuting officers and thereafter refused to return to such State to give testimony in a criminal proceeding pending in the courts of that State.

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[1] Compare *Edwards* v. *California,* 314 U. S. 160, 186. What the State could not do in this respect under the Fourteenth Amendment, the United States may not do under the Fifth Amendment.

V.

This Court has not determined, but should determine, whether a conspiracy to wrongfully influence legislation where the parties thereto are alleged to be both the bribe givers and bribe takers constitutes an indictable offense at common law under the catch-all State Statute, Section 28.773, Michigan Statutes Annotated, and more particularly when separate statutes of that State provide for the crime of giving bribes (Section 28.312, Michigan Statutes Annotated) and of taking bribes (Section 28.313, Michigan Statutes Annotated), thereby satisfying the requirements of Subsection 2 of the Fugitive Felon Act that the fleeing witness must have done so with the intent to avoid giving testimony in a criminal proceeding pending in the State court in which a felony is charged. These two State statutes have been printed in the margin of this petition.[2]

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[2] Section 28.312, M. S. A.:

"Bribes, giving or offers to public officials:

"Any person who shall corruptly give, offer or promise to any public officers, agents, servants, or employees after the election or appointment of such public officer, agent, or employee, either before or after such public officers, agents, servants or employees shall have been qualified or shall take their seats, any gift, gratuity, money, property or other valuable thing, the intent or purpose of which is to influence the act, vote, opinion, decision or judgment of such public officer, agent, servant, or employee or his action on any matter, question, cause or proceeding which may be pending or may by law be brought before him in his public capacity, or the purpose and intent of which is to influence any act or omission relating to any public duty of such public officer, agent, or employee shall be guilty of a felony."

Section 28.313:

"Acceptance by public officer; forfeiture of office, felony:

"Any executive, legislative or judicial officer who shall corruptly accept any gift or gratuity, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his vote, opinion or judgment shall be given in any particular manner, or upon a particular side of any question, cause or proceeding which is or

Lower Federal courts have categorically held that there does not exist any such crime as a conspiracy between bribe givers and bribe takers, it not being permissible to make a conspiracy out of the concert of action and plurality of parties necessary to constitute the substantive offense:

Vannata v. *United States*, 289 Fed. 424
United States v. *Dietrich et al.*, 126 Fed. 664
United States v. *New York Central, etc. Co.*, 146 Fed. 298
United States v. *Sager*, 49 Fed. (2nd) 725
United States v. *Zueli*, 137 Fed. (2nd) 845
United States v. *Hagan*, 27 Fed. Supp. 814.

The same rule has been applied in State courts:

Shannon v. *Commonwealth*, 14 Pa. 226
People v. *Keyes*, (Cal.) 284 Pac. 1105
People v. *Wettengill* (Col), 58 Pac. (2nd) 279
State v. Martin, 199 Iowa, 643
People v. *Purcell et al.*, 304 Ill. App. 215
Miles v. *State*, 58 Ala. 390.

While apparently this Court has not had occasion to specifically determine the question, there are expressions in at least two of its opinions indicating that it recognized and approved the rule:

United States v. *Katz*, 271 U. S. 354
Gebhardi v. *United States*, 287 U. S. 112.

The rule has been approved by text-book writers:

Wharton on Criminal Law, (12th ed. Vol. 11, Sec. 1604).

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may be by law brought before him in his official capacity, or that in such capacity, he shall make any particular nomination or appointment, shall forfeit his office, and be forever disqualified to hold any public office, trust or appointment under the constitution or laws of this State, and shall be guilty of a felony, punishable by imprisonment in the state prison not more than ten (10) years, or by fine of not more than five thousand (5,000) dollars."

Clark & Marshall on Law of Crimes, 2nd ed., 195
15 Corpus Juris Secundum, p. 1074
11 American Jurisprudence, 556, 557, Sec. 20
Burdick, Law of Crimes, Vol. 3, p. 439.
Annotations, 11 A. L. R. 196; 104 A. L. R. 1430, 1435.

VI.

This Court has not decided, but should decide, whether it constitutes cruel and unusual punishment, within the prohibition of the Eighth Amendment to the Constitution of the United States, for a witness fleeing to be punished by the same punishment provided in the same statute for gangsters fleeing to avoid punishment for the named crimes of violence, more particularly when the defendants in the State criminal proceeding in which the petitioner was wanted to testify could not have been punished under the statute had they fled the State to avoid prosecution and had petitioner appeared and refused to testify, he would have been subject to punishment, if at all, as for contempt.

This is not simply a case of a statute fixing punishment for a crime, as concluded by the court below (R. 116). This is a case where punishment is fixed for an alleged crime, which punishment is equal to, and the same punishment provided in the same statute for criminals fleeing to avoid prosecution for gangster crimes of violence, including murder, robbery, etc., as named in the statute, and when the petitioner could not have been punished in the courts of the State from which he fled except for contempt.

There appear to be no precedents on the exact point. The nearest one is:

Weems v. *United States*, 217 U. S. 349.

The punishment provided of a maximum sentence of five years and a maximum fine of $5,000.00 is far in excess of the punishment provided for failure of a witness to appear or who appears and refuses to testify before any Congressional Committee, or any administrative agency, or the Fed-

eral courts. Compare, for instance, Title 2, Sections 192 and 212, U. S. Code; Title 15, Section 50, U. S. Code; and Rule 17(g) of the Federal Rules of Criminal Procedure.

This is entirely aside from the fact that the petitioner was named both as a co-conspirator and a co-defendant in the State warrant, (R. 5, 10); that the alleged grant of immunity by the grand juror, in not recording the answers to the questions (R. 77, 79), did not comply with the State statute, copied in the margin.[3] The amendment, which is not in this record but issued several months later, purported to amend the *journal* entries and not the *order* itself. (R. 38) This amendment to the *journal* entry did not contain a grant of immunity.

It may be added for the information of the Court that when petitioner was forcibly taken back to Michigan under the indictment and then forcibly taken before the State Examining Magistrate and called upon to testify in the preliminary examination, the petitioner claimed his constitutional immunity against self-incrimination. The claim was sustained by the Examining Magistrate with respect to self-incrimination in the pending Federal proceedings. The State then appealed the case to the Supreme Court of Michigan, where it was argued on March 4, 1947 as Docket No. 86. It had not been decided at the time this petition was prepared.

WHEREFORE, petitioner prays that this Honorable Court issue a writ of certiorari to the United States Circuit Court

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[3] Section 28.946

> "No person shall upon such inquiry (before the Grand Juror) be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him." (Matter in parenthesis supplied)

of Appeals for the Sixth Circuit to the end that the questions involved may be fully presented to this Court and justice done in the premises according to the Constitution and laws of the United States.

Respectfully submitted,

O. R. McGuire,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

No. ———.

CHARLES F. HEMANS, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

JURISDICTION.

Jurisdiction of this Court to entertain this petition and to grant the writ of certiorari to the United States Court of Appeals for the Sixth Circuit has been referred to in the petition and is contained in Title 28, Section 347, U. S. Code and Rule 37(b) of the Federal Rules of Criminal Procedure.

OPINIONS BELOW.

The District Court of the United States for the Eastern District of Michigan filed no written opinion. The United States Circuit Court of Appeals for the Sixth Circuit (hereinafter referred to as the court below) filed a written opinion on July 28, 1947, and its judgment was entered the same day. The opinion has not been reported as yet, but it is contained in the Record (pp. 101, 120). Its judgment is likewise in the Record (p. 100).

STATEMENT OF THE CASE.

A statement of what we believe to be the essential record facts is contained in the petition for the allowance of the writ and need not be repeated herein. It may be stated by way of explanation that after Counsel for the petitioner had seasonably prepared their record (R. 1, 31, excepting the stipulation on Page 29) and served January 9, 1947, same on respondent's counsel, they desired an extension of time. A stipulation for such an extension was entered into and approved by the trial court allowing additional time to February 15, 1947 (R. 29). Respondent's counsel then filed on February 10, 1947 (R. 32) a supplemental designation of record and pages 33 to 98, inclusive, were thereupon added to this record by the Government.

So much time had been consumed in preparing the record that petitioner's counsel did not request additional time within which to place in the record the testimony of petitioner's witnesses, the testimony of only one of such witnesses for petitioner being included by the government, that of the Clerk of the Circuit Court for Ingham County (R. 72, 76). Also, counsel for the petitioner were of the opinion that the verdict of the jury on the conflicting evidence mentioned by the trial court in its instructions to the jury (R. 20) foreclosed questions of fact involved and rendered the inclusion of all testimony by all witnesses of little value on an appeal, involving principally questions of law. However, counsel for petitioner could not exclude the large additions made by the Government to the record.

It seems necessary to make this statement in view of the fact that the court below has seen fit to refer to the record and state that "from the evidence in the case, the jury was well warranted in believing that, in leaving Michigan, Hemans left with the deliberate intention to avoid testifying in the criminal proceedings then pending in the Circuit Court for Ingham County." (R. 106).

Except for the testimony of Circuit Court Clerk Hilliard (R. 72, 76), whose testimony had nothing whatsoever to do

with the intent of petitioner on leaving Michigan, all the testimony of witnesses in this record is that of prosecuting witnesses, i.e., Grand Juror Coash, Prosecutors Foster and Cummins, and the Army officer at Chicago, Colonel Taylor. The testimony of petitioner's witnesses as to his intent was not included in the record on appeal.

Michigan Circuit Judge Coash was permitted by the trial court to testify that he, as Grand Juror, had granted petitioner immunity on July 17, 1946, (R. 38), while the warrant naming petitioner and all of the others as co-conspirators and co-defendants was issued July 20, 1946, (R. 5, 10). In an effort to meet this testimony, the petitioner's counsel placed in evidence the so-called grant of immunity of July 17, 1946, and it was included in the record by the Government. (R. 77, 79). This order did not comply with the Michigan Immunity Statute, which has been heretofore copied in the margin of the petition (p. 15) because the answers to the questions were not stated therein and were not copied into the journal. Judge Coash admitted as much and testified that he issued an order "correcting the journal", (R. 38). This order purporting to correct the "journal", but not the order itself, was not included in the record.

The failure of the Grand Juror and the Prosecuting Attorney to comply with the Michigan Immunity Statute in including the answers in the order granting the immunity and recording the same in the journal is not a mere technical defect. Attached hereto as Appendix "B" is an identical immunity order, as to form, granted May 23, 1944, to this petitioner in another Ingham County, Michigan, case and there is also attached as Exhibit "C" a copy of a grand juror warrant issued by Judge Coash on April 25, 1947, charging the petitioner with having promised a bribe to a member of the State legislature in connection with the identical bribery matter in which the said so-called grant of immunity was issued.

POINTS RELIED UPON.

I.

This is a case of first impression and the Federal Statute involved is doubtful both as to its constitutionality and its terms.

II.

The offense charged in the State warrant is not an indictable offense at the common law within the terms of the State Statute on which the warrant is based. Thus "no felony" is charged therein within the terms of the Fugitive Felony act.

III.

The State Statute on which the proceedings in the State Court are based is contrary to the Fourteenth Amendment to the Federal Constitution and void.

IV.

It is apparent on the face of the State warrant charging conspiracy between bribe takers and bribe givers that it is void. Hence there are no criminal proceedings in which a felony is charged.

V.

In view of the requirements of the Fifth and Sixth Amendments to the Constitution of the United States, a Federal criminal statute, such as the Fugitive Felony Act, may not validly incorporate State criminal statutes, as subsection 2 of this Fugitive Felony Act attempts to do.

VI.

There was no criminal proceeding pending in the Circuit Court for Ingham County as charged in the indictment.

ARGUMENT.

1.

This is a case of first impression and the Federal Statute involved is doubtful both as to its constitutionality and its terms.

The Federal Statute, Title 18, Section 408(e), U. S. Code, has been quoted in the petition (Ante, p. 6) and will not be requoted here. Directly involved is the italicised language of the statute but the balance thereof is of importance for comparative purposes.

The legislative history of this statute has been summarized, with some quotations from the debates in the Senate and House of Representatives and from the Committee reports, in an Appendix "A" to this brief.

The Fugitive Felon Act is one of a series of so-called crime bills which appear to have been written in their first form by the Department of Justice. Their history has been compiled by that Department in a pamphlet entitled "Crime Laws of the 73rd Congress", Government Printing Office, 1934.

One of such statutes was recently before this Court in *Jerome* v. *United States*, 318 U. S. 101, 108, wherein the conviction was reversed.

The purpose of this particular Fugitive Felon Act was stated in a memorandum by the Attorney-General, which appeared in the Congressional Record (p. 5735, March 29, 1934), wherein it was admitted that the bill was drastic in nature and would extend Federal Criminal jurisdiction in a marked degree.

The bill was drastically amended in the House after it had passed the Senate: *First* in an attempt to place the same under the Interstate Commerce Clause of the Constitution; *second,* to substitute in lieu of the word "felony" the specific crimes of gangster violence now contained in subsection 1 of the statute; and *third,* to strike out in its entirety subsection 2 relating to fleeing witnesses. As rea-

sons for the latter amendment, Chairman Hatton W. Sumners of the Committee on the Judiciary stated on the floor of the House that:

> "Mr. Speaker, I may say to the gentleman from Missouri that the witness aspect of the matter is included in the first bill; but after consideration by the Committee and mature consideration by the Department of Justice, the Department did not feel that they wanted to risk having the provisions incorporated in the bill, and that is why it was taken out." (78 Cong. Rec. 8129.)

This subsection 2 was subsequently replaced in the bill by the Conference Committee, for the reason, as explained by Chairman Ashurst of the Senate Judiciary Committee, that Senators Copeland and Vandenburg had served notice that they would oppose any report which struck from the bill this witness provision. (78 Cong. Rec. 5736). In replacing the witness provision in the bill, the Conference Committee did not amend the language thereof by substituting for the word "felony" therein the specific crimes as had been done in subsection 1 thereof.

Subsection 1 of the bill, relating to gangsters fleeing the jurisdictions of the States to avoid prosecution therein for the specific crimes of gangster violence named therein, or persons aiding such fleeing criminals, has been before the lower courts on a number of occasions. The constitutionality of that subsection 1 has been upheld in such courts. See *United States* v. *Miller et al.*, 17 Fed. Supp. 65, 66; *Simmons* v. *Zerbst*, 18 Fed. Supp. 929; *Barrow* v. *Owen*, 89 Fed. (2nd) 476; and *United States* v. *Brandenburg*, 144 Fed. (2nd) 656.

Yet the constitutionality of Subsection 1 of this statute, might well be upheld under the familiar doctrine that the Interstate Commerce Clause of the Constitution is sufficient to sustain Federal statutes designed to prevent the pollution of the stream of interstate commerce with lottery tickets, deleterious drugs, food, prostitutes, stolen automobiles and other goods, etc.

Such are the cases referred to and cited in the opinion of the court below in upholding the constitutionality of the witness provision in Subsection 2 of the said statute, the applicability of which cases petitioner vigorously challenged in the court below and repeats here.

But even to uphold the constitutionality of this Subsection 1 of the Fugitive Felon Act, which this Court has not done, it would seem to be necessary that the lower courts meet the issue that the Extradition Clause in Article IV, Section 2 of the Federal Constitution having provided a specific procedure for dealing with criminals who flee to one State to avoid prosecution for crime in another State, all other possible procedures are excluded so far as the States are concerned.

Compare *Pierce* v. *Creecy*, 210 U. S. 387.

However, our only concern here with Subsection 1 of this Fugitive Felon Act is the application thereto of the familiar rule applied in *United States* v. *Brandenburg*, 144 Fed. (2) 656 (citing decisions of this Court to the same effect) that crimes named in Federal statutes without definition are given their common law meaning by the courts.

Subsection 2 of this Fugitive Felon Act purporting to make it a crime for a person wanted as a witness in a State criminal proceeding, wherein a felony is charged, to travel in interstate commerce to avoid testifying therein does not enumerate the specific crimes, as does Subsection 1, but refers solely to "felony" charged in the State criminal proceedings. Applying the familiar rule applied in *United States* v. *Brandenburg* with respect to Subsection 1 of the Fugitive Felon Act,[1] the crime charged in the State pro-

[1] Title 18, Section 541, U. S. Code which provides that:

> "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors,"

is inapplicable to what may be felonies under State statutes.

ceeding would have to be a felony at common law and not a felony because a State may have so classified in a statute the particular crime named in the State criminal proceedings.

There was and is no common law crime of conspiracy to influence or obstruct legislation nor of a conspiracy to give bribes and to receive bribes for that purpose (Infra, pp. 26, 35). Such conspiracies as existed at common law—but not including the conspiracies named in this particular State proceeding—were and are misdemeanors at the common law. 9 Corpus Juris, 215; *Berkowitz* v. *States,* 93 Fed. 452; Wharton's Criminal Law, 11th ed. Sec. 1607; Burdick, Law of Crimes, Vol. 3, p. 439, Sec. 987. In Encyclopedia Britannica, Vol. VI, 11th ed. p. 981 it is stated that:

> "Conspiracy at common law is a misdemeanor and the punishment is fine or imprisonment, or both, to which may be added hard labor in the case of a conspiracy to cheat and defraud, or to an extortion of money or goods, or falsely to accuse of any crime, and to obstruct, pervert or defeat the cause of justice."

The fact that the Michigan conspiracy statute, quoted in the petition (Ante, p. 6), if it be constitutional, which we deny (Infra, pp. 35, 38), purports to make a felony of all indictable conspiracies at common law does not change the fact that at common law a conspiracy for whatever purpose is only a misdemeanor.[2]

The obvious fact is pointed out in *United States* v. *Brandenburg* that this Fugitive Felon Act is intended to have uniform application throughout the United States,

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[2] In *Bannon et al* v. *United States,* 156 U. S. 464, 467, it was stated that:

> "Neither does it necessarily follow that, because the punishment affixed to an offense is infamous, the offense itself is thereby raised to the grade of felony. The word 'felony' was used at common law to denote offenses which occasioned a forfeiture of the lands or goods of the offender, to which capital or other punishment might be superadded according to the degree of guilt. 4 Black Com. 94, 95; 1 Russel, Crimes 42."

this Court observing in *Jerome* v. *United States* that it was desirable Federal criminal statutes have uniformity of application. Since the word "felony" does not denote any specific offense, but merely denotes the degree of punishment for a large number of offenses, some of which are felonies and others of which are misdemeanors at common law, and any or all may be one or the other under statutes of the various States, uniformity in application of the witness provision of the Fugitive Felon Act would be utterly destroyed unless the word "felony" as used in Subsection 2 of this Fugitive Felon Act is given its meaning at common law. Given such meaning uniformity of application would be obtained, but this indictment and sentence would fail because the alleged crime charged in the Grand Juror warrant, forming the basis of the preliminary examination before the Examining Magistrate, does not even exist at common law, and even if it did, it was nothing more than a misdemeanor at common law.

Thus, by way of summary of this point, petitioner urges that Article IV of the Federal Constitution, both in its Privileges and Immunities Clause and in its Extradition Clause, operates and was intended to operate as an express limitation on the balance of the Constitution, including the Interstate Commerce Clause in Article 1, Section 8 of the Constitution; that thereby the Federal power does not exist, under the Tenth Amendment to the Constitution of the United States or otherwise, to make it a crime for a witness, not charged with crime in the States from which he traveled, to travel in interstate commerce; that, in any event, the State criminal proceedings described in the indictment did not charge the commission of a felony within the terms of either Subsection 2 of the Fugitive Felon Act or as alleged in the indictment; that the petitioner has been denied due process of law in the courts below, contrary to the Fifth Amendment; and that the punishment imposed on him by the trial court of four years in prison and a fine of $1,000.00 for his otherwise innocent travel in interstate

commerce constitutes cruel and unusual punishment—being punishment which could not have been given to the defendants in the State criminal proceeding if they had fled the State to avoid prosecution (their alleged crime of conspiracy not having been enumerated in Subsection 1 of the Fugitive Felon Act); being the same punishment provided in the said Statute for persons fleeing the State to avoid prosecution for the crimes enumerated in Subsection 1 of the said Act; and being punishment largely in excess of imprisonment for contempt which is the only punishment that could have been imposed on him by the Michigan court for refusal to testify [3] and being largely in excess of the punishment provided in Federal statutes and rules of court for recalcitrant witnesses before Federal courts, Congress and administrative agencies.

But whether petitioner be correct or incorrect in his position on this phase of the matter, the issues are so important to the administration of criminal justice that this petition should be allowed and such doubts as there may be resolved by this Court.

II.

The offense charged in the State warrant is not an indictable offense at the common law within the terms of the State Statute on which the warrant is based, and thus no "felony" is charged therein within the terms of the Fugitive Felon Act.

The court below stated that the warrant charged the conspirators with corruptly influencing action upon proposed legislative measures and that bribery was only a part of the scheme concocted by the conspirators to defeat the proposed legislation (R. 110).

But if the court below be correct in this statement, it nevertheless necessarily follows that the conspiracy must

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[3] Sections 27.511, 27.530, 27.532, Michigan Statutes Annotated.

be an indictable offense at the common law—whether it be a conspiracy to defeat proposed legislation or whether it be a conspiracy to give and receive bribes for that purpose. Otherwise the conspiracy would not come within the terms of Section 28.773, Michigan Statutes Annotated which, even if complying with the Fourteenth Amendment to the Constitution of the United States, purports to provide that:

> "*Any person who shall commit any indictable offense at the common law,* for the punishment of which no provision is expressly made by any statute of this State, *shall be guilty of a felony* * * *."

We categorically deny that at the common law a conspiracy to give and receive bribes to influence legislation or a conspiracy to influence legislation constitutes an indictable offense, whether as a felony or as a misdemeanor.

Wright, *On Criminal Conspiracies and Agreements* (with Carson's American notes, 1896, p. 6) states there appeared no evidence that during the period from 1200 to 1600 A. D., there were any crimes of conspiracies or combinations except those authoritatively and finally defined in A. D. 1305 in the Ordinance of Conspirators (33 Edw. 1) as consisting in confederacy or alliance for the false and malicious promotion of indictments and pleas, or embracery or maintenance of various kinds.[4] In a note, p. 12, to the text it is

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[4] "Who be conspirators and who be champertors; conspirators be they who do confederate, or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously, to indite; (2) or falsely to maintain pleas; (3) and such as cause children within age to appeal men of felony, whereby they are imprisoned, or sore grieved; (4) and such as retain men in the country, with liveries or fees, for to maintain their malicious enterprises; and this extendeth as well to the takers as the givers; (5) and stewards and bailiffs of great lords, which, by their signory, office or power, undertake to hear or maintain quarrels, pleas or debates, that concern other parties than such as touch the estates of their lords or themselves; (6) This final ordinance and definition of conspiracy, was made and accorded by the

stated that search had been made, without success, for mention before the seventeenth century of any other kind of criminal combination than those named in this statute:

> "* * * in Britton, Bracton, Fleta, Glanville, the Mirror, the cases of confederacy and conspiracy mentioned in the indices to the Year Books and Books of Assizes, the Register, Fitzherbert's Abridgements (Titles Conspiracy, Confederacy and Carone) Rastal, Staundforde's P. C., Crompton's Justice, Pulton, the cases cited in Ashe's elaborate Index to the Common Law (1614) and in Coke, and in the more modern Text Books. The only early instance of an attempt to apply the law of conspiracy to other purposes seems to be the case, Anon. 1351, where a suit was brought to set aside judgment on a conviction for conspiracy to imprison a man wrongfully until he should pay a fine; and the court said that this was not a matter of conspiracy, but rather damage and oppression of the people, and reversed the judgment.
>
> "Even the civil writ of conspiracy appears not to have been extended until the 17th century to any matters beyond the purview of the 33 Edw. 1. Instances will be found in the 15th and 16th centuries of its application to the making or use of false evidence, which may be traced to the statute, 1413, 1 Hen. 5, c. 3; but even this was not allowed in earlier times. See e.g.

King and his council, in his parliament, the 33rd year of his reign." (33 Edw. 1)

Holdsworth, *History of English Law*, Vol. 3, pp. 400-401 says:

> "Since Edward I's reign, if not earlier, the law had known the offense of conspiracy; but the only conspiracy which it punished was a conspiracy to take civil or criminal proceedings maliciously." Also, that, "But it is not till certain statutes of Edward I's reign gave a writ of conspiracy that the offense definitely emerged. Though some writers have thought that such a writ existed at common law, Dr. Winfield's examination of the MSS register of writs would seem to make it very much more probable that it owes its origin to these statutes. * * * We must therefore regard these statutes and the writ given by them as the starting point of the modern law on the subject." See also Holdsworth, Vol. 3, pp. 379, 380; Vol. 5, pp. 203, 205.

> in 1364, Year Book, 38 Edw. 3, p. 13 b, writ of conspiracy to forge and put in evidence at a trial a false deed of release. Thorp J., said: 'And do you think you have a writ of conspiracy on ground of evidence? You shall not have it.' "

Wright further states, p. 6, that "during the reigns from that of Edward III to the end of that of Elizabeth, various statutes were directed against combinations for treasonable purposes or for breaches of the peace, against combinations by merchants to disturb the markets or prices, and against combinations by masons and carpenters, by victualers to raise prices and by laborers to raise wages or alter hours; but no mention has been found in any of the writers, reports, or abridgements of the period before the 17th century of any kind of a conspiracy, confederation or combination, as being criminal at common law, except the crime of conspiracy as defined by the Ordinance of 1305."

Compare Holmes, *The Common Law*, 1881 ed., p. 143, from which it seems clear that his conclusion is the same as that of Wright and Holdsworth with respect to conspiracies at common law being very limited as above stated.

The offenses which were classified as conspiracies in the Ordinance of Conspirators of 1305 and the ones subsequently established by statute during the reigns of Edward III to the end of the reign of George III were none of them conspiracies to obstruct or influence passage of legislation or to give and receive bribes for that purpose. In fact, during the reign of George III, for instance, history records that Parliament was largely controlled by the King and his Ministers through the use of bribes, greatly to the discomfiture of the American colonists. Holdsworth, Vol. 10, pp. 580, 581.

Holdsworth indicates that there were passed at later dates English statutes prohibiting bribery but principally against bribery to obstruct justice. Exhaustive research has failed to produce a single decision at the common law

or a single statute prior to the settlement at Jamestown in 1607 purporting to make it a conspiracy to give bribes to members of a lawmaking body or for members of such lawmaking body to receive bribes. Also, it has failed to produce any statute purporting to make it a conspiracy to impede, obstruct or influence the passage of legislation. No evidence in the form of a decision of a court or a statute of Parliament has been produced by the prosecution or cited by the court below purporting to show that it was an indictable offense at the common law prior to the end of the reign of George III to conspire to give and receive bribes for the purpose of obstructing legislation or to conspire to obstruct or influence the passage of legislation.[4a]

On the contrary, such an authority as Holdsworth, *History of the English Law*, Vol. 8, pp. 379, 380, has stated that:

> "*The modern crime of conspiracy is almost entirely the result of the manner in which conspiring was treated by the court of Star Chamber.* Almost the only idea which it has borrowed from the common law is the rule, taken from the statutory writ of conspiracy, that the crime (like the crime of riot) cannot be committed by one person, though the other person need not be specified, and may indeed be unknown. The other two essential features of the crime—(i) the fact that the gist of the offense is the conspiracy and not acts done in pursuance thereof, and (ii) the fact that the crime is committed if persons conspire to commit any unlawful act by unlawful means—are derived ultimately from the practice of the Star Chamber. *But these two essential features were developed by the common law courts after the Restoration,* * * *." (Italics mine.)

[4a] Carson in his *American Notes* (1887) to Wright *on Criminal Conspiracies and Agreements* summarizes in Chapter III, pp. 138, 185, American conspiracies held to be indictable and neither in Conspiracies to Commit Felonies nor in Conspiracies to Commit Misdemeanors does he list any conspiracy as of that late day to obstruct or influence legislation or conspiracy between bribe givers and bribe takers for the purpose of influencing legislation.

The Restoration was the return of King Charles II in 1660 to power, and it is to be remembered that at least some of the supporters of the Commonwealth Government were hunted by King Charles' men in the various American colonies. The Supreme Court of Michigan has stated in *In Re Sanderson,* 289 Mich. 165, 174, that:

> "The common law was brought to this country by the English colonists, who settled at Jamestown in 1607. What was brought was not only the Common Customary Law of England, but the law as modified by English statutes of general operation up to that time."

Compare: *Pawlet* v. *Clark,* 9 Cranch, 292; United *States* v. *Reid,* 12 How., 361.

Michigan was carved out of the Northwest Territory and was thus once a part of Virginia. The rule in that Commonwealth is that the common law of England, in so far as it is not repugnant to the Bill of Rights and the Constitution of said Commonwealth remain the law in Virginia except as altered by its General Assembly (Tit. 2, Chap. 2, Section 2 of Virginia Code and *Elliott* v. *Commonwealth,* 172 Va., 598). The right and benefit of all writs, remedial and judicial, given by any Act of Parliament prior to the fourth year of the reign of James the First, of general application, and not in conflict with the Bill of Rights, Constitution and Acts of the General Assembly are also saved in Virginia (Tit. 2, Chap. 2, Sec. 3, Virginia Code; *United States Fidelity & Guaranty Company* v. *Carter,* 161 Va., 381; *Scott* v. *Lunt,* 7 Peters, 596).

Thus the retention in Virginia of the English common law and the benefits of certain remedial writs enacted by Parliament prior to the fourth year of the reign of James I, where not modified by State Constitution or Statutes, is broader than any retention of the English common law and statutes in Michigan in force in 1607. But since the crime of conspiracy to obstruct or influence legislation and the crime of conspiracy between bribe givers and of bribe

takers, as an inducement for that purpose, were both unknown to the Customary Common law and unknown to any English statue in force in 1607 or to the fourth year of the reign of James I, it necessarily follows that under any view of the matter there were no such offenses as charged in this State Warrant which were indictable at the common law.

Moreover, the Supreme Court of Michigan stated in *In Re Lambrecht,* 137 Mich., 450, citing an earlier case of *In Re Matter of Lamphere,* 61 Mich., 105, that:

> "We can look only to the statute for any crime punishable in this State. We look to the common law for definition and principle in our criminal jurisprudence, but unless the statute provides a penalty, acts criminal at common law are not crimes in the State."

Consequently, the entire basis of the criminal proceeding alleged in the indictment to have been pending in the Circuit Court for Ingham County, Michigan, is lacking; the alleged crime of conspiracy—whether to obstruct and influence legislation or whether of some to give bribes and of others to receive bribes—charged in such proceedings has no basis whatever under either the specific and express statutes of Michigan or at the common law; and, consequently, such proceedings do not charge the commission of a "felony", a condition precedent to any crime having been committed by the petitioner under the Fleeing Witness subsection 2 of the Fugitive Felon Act.

These propositions of law were argued at length to both the trial court and to the Sixth United States Circuit Court of Appeals. Both committed reversible error in not sustaining the motion to dismiss the indictment as not charging an offense within the terms of the Fugitive Felon Act.

The court below, in rejecting petitioner's argument that no such crime as charged in this state proceeding was an indictable offense at the common law, attempted to explain away *In Re Lambrecht,* 137 Mich., 450, 454, by referring to *People* v. *Tenerowicz,* 266 Mich. 276, 283 (R. 108), a case

involving a conspiracy to obstruct justice by means of a bribe. The court below entirely overlooked the fact that "embracery" was one of the conspiracies named in the Ordinance of Conspirators (33 Edw. 1). Embracery was a conspiracy to obstruct justice in attempting to corruptly influence a jury. The crime of conspiracy to obstruct justice was known to the common law.

The term "conspiracy" does not include the whole catalogue of crimes. The fact that one kind of conspiracy or even a dozen kinds of conspiracies were indictable offenses at the common law, possibly before and after the Ordinance of Conspirators, does not establish that there existed as indictable offenses at common law the conspiracy, or conspiracies, charged in these particular state proceedings. On the basis of Wright, Holdsworth, and Holmes, all authorities of the highest order on the common law, it is quite obvious that these particular crimes of conspiracy did not exist at the common law. We have hereinbefore argued that they do not exist to this day.

In connection with the above quoted extracts from the opinions of the Supreme Court of Michigan in *In Re Sanderson* and *In Re Lambrecht,* that Court in *Alderman* v. *People,* 4 Mich. 414, reviewed many decisions and while admitting that there were some contrary to its conclusion in that case, said that:

> "From the whole current of decisions the following principles are clearly deducible: 1. That to constitute an indictable conspiracy there must be a combination of two or more persons to commit some act known as an offense at Common Law, or that has been declared such by statute. 2. If the conspiracy be to commit an offense known and recognized as an offense at Common Law, so that by describing it by the term by which it is generally known, the nature of the offense is clearly indicated, then it will be only necessary to use such term in describing the object of the conspiracy. 3. If on the contrary, the combination be to do an act, not in itself unlawful, but which is agreed to accom-

plish by criminal or unlawful means, then those means must be particularly set forth and be such as constitute an offense either at Common Law or by statute."

We have argued herein, and we think we have established that neither at Common Law nor by later Michigan statutes is it a crime to conspire and confederate to secure the defeat or the passage of legislation. There are, indeed, many proposed statutes which are vigorously supported and opposed by large combinations. Consequently the object of the defendants named in the warrant to defeat the particular bill in the Michigan legislature or elsewhere is entirely lawful.

The means used to defeat the said bill, namely conspiracy between bribe givers and bribe takers is unknown at the Common Law. However, such a conspiracy between bribe givers and bribe takers to defeat legislation has not been listed down to modern times by Carson in his American Notes to Wright *On Conspiracies and Agreements.* More particularly, such a criminal conspiracy has not been included in the Michigan statutes, as we have heretofore established.

But even more than that, we have abundantly established herein that a conspiracy between bribe givers and bribe takers for any purpose can not legally exist where there are statutes providing for the substantive crimes of giving bribes and for the substantive crimes of receiving bribes, requiring for the consummation of each of such crimes plurality of parties and concert of action.

It, therefore, results that neither the object of the conspiracy charged in the warrant nor the means charged to carry out the same is unlawful or corrupt at law—however reprehensible in morals the same may have been.

Incidentally, the burden of research, as illustrated by this brief, cast upon counsel for the petitioner in attempting to locate any record of indictable offenses at the Common Law of either a conspiracy to obstruct and influence legislation or a conspiracy consisting of a plurality of

bribe givers and bribe takers for the purpose of influencing legislation, constitutes abundant proof that Subsection 2 of the Fugitive Felon Act, attempting to incorporate by reference the criminal law of the forty-eight States, the territories and the possessions naming felonies and providing punishment therefor, and Section 28.773, Michigan Statutes Annotated are, respectively, in conflict, with the Fifth and Sixth Amendments and the Fourteenth Amendment to the Constitution of the United States (Infra, 35, 38). Similarly applicable to both the Federal and the State sections of the statutes is the language of this Court in *Screws* v. *United States,* that:

> "Congress did not define what it desired to punish but referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited. To enforce such a statute would be like sanctioning the practice of Caligula, who 'published the law, but it was written in a very small hand, and posted up in a corner so that no one could make a copy of it.' "

Summarizing this point, the petitioner claims that the State warrant in question did not charge a felony within the terms of Subsection 2 of the Fugitive Felon Act; that even if it did, neither he nor his counsel have been able to find and determine that the alleged offenses charged in the warrant constituted indictable offenses at either the customary common law of England or as modified by statutes of that country to 1607 or to July 4, 1776 when the Declaration of Independence was issued.

III.

The State Statute on which the proceedings in the State Court are based is contrary to the Fourteenth Amendment to the Federal Constitution and void.

This State Statute, Section 28.773, Michigan Statutes Annotated, under which the criminal proceedings were instituted in Ingham County, Michigan, and on which the

one-man grand juror warrant is based, is contrary to the Fourteenth Amendment to the Constitution and too vague to constitute a valid penal statute thereunder.[5]

While Michigan Statutes provide for the substantive crime of bribe giving (Section 28.312, Michigan Statutes Annotated, comparable to Title 18, Section 200, U. S. Code) and of bribe taking (Section 28.313, Michigan Statutes Annotated, comparable to Title 18, Section 199, U. S. Code), there is no specific conspiracy statute in the State of Michigan comparable to Title 18, Section 88, U. S. Code.

The crimes which are to be punished under this Section 28.773, Michigan Statutes Annotated, by imprisonment for a maximum of five years or a fine of $2,500.00 are not named in said statute. Such crimes are generally described therein as "indictable offenses at the common law", for which no penalties are expressly made by any other statute of the State.

It is an undeniable fact that the Fleeing Witness provision of the Fugitive Felon Act attempts, by the use of the word "felony" in such place, to incorporate by this general reference the felony crimes of the several States but in this instance the felony crime is not named in the State statute which purports to incorporate the indictable offenses at the common law for which no punishment is expressly named in any other State statute. *This is incorporation by reference on a reference run riot.*

Compare: *Town of Conway* v. *Lee* (S.C.), 38 S.E. 914;
State v. *Gaster*, 45 La. Ann. 636;
Yeo v. *Tweedy*, 286 Pac. 611;
Rutledge v. *Greenville*, 155 S.C. 520;

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[5] Justices Murphy, Reed and Rutledge joined in a dissenting opinion in *United States* v. *Petrillo*, containing the statement that: "Anglo-American law does not punish citizens for violations of vague and uncertain statutes. There is no place in our criminal law for acts defined as detrimental to the interests of the State. A statute is invalid when 'so vague that men of common intelligence must necessarily guess at its meaning'."

Savage v. *Wallace,* 165 Ala. 572;
Pendley v. *Fayette County Comm.,* 185 Ala. 523.
See test applied as to a Civil Statute in *Panama R. Co.* v. *Johnson,* 264 U. S. 375, at pages 391-392.

For a person to determine in this instance what are indictable offenses at the common law, he must search through a library devoted to the common law. Then having determined, if possible, what are indictable offenses at the common law, such citizens must now search the voluminous statutes of the State of Michigan to determine whether punishment for such indictable common law offenses had been expressly made in any of these State statutes. In this instance he would find, as has counsel for petitioner after long research, that there are no such indictable offenses at the common law as a conspiracy to obstruct legislation or to give and to receive bribes for doing so. Aside from all else, there is certainly applicable here the above quoted language of a majority of this Court in *Screws* v. *United States,* that:

> "Congress did not define what it desired to punish but referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited. To enforce such a statute would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner so that no one could make a copy of it.' "

Neither did the Michigan Legislature define in this statute what it desired to punish but literally threw at the people of that State the entire learning of the common law, including the modifications by statutes of Parliament to 1607, and the voluminous statutes of Michigan in force since territorial days, with advice to the people to find out for themselves whether there are any indictable offenses at the common law punishable under this statute with imprisonment for five years or a fine of $2,500.00.

We think that unquestionably this Michigan statute under which the one-man grand juror warrant was issued

and as to which the criminal proceedings are pending referred to in the indictment of petitioner is in conflict with the Due Process Clause of the Fourteenth Amendment to the Federal Constitution and void.

Compare: *Screws* v. *United States,* 325 U. S. 91.
Cline v. *Frink Dairy Co.,* 274 U. S. 445.
Collins v. *Kentucky,* 234 U. S. 634.
American Seeding Machine Co. v. *Kentucky,* 236 U. S. 660.
Waters-Pierce Co. v. *Texas,* 212 U. S. 86.
Fox v. *Washington,* 236 U. S. 273.
Omaechevarria v. *Idaho,* 246 U. S. 343.
Kinnane v. *Detroit Creamery Co.,* 255 U. S. 102.
Miller v. *Strahl,* 239 U. S. 426.
Weeds, Inc. v. *United States,* 255 U. S. 109.
Conally v. *General Construction Co.,* 269 U. S. 385.
Town of Conway v. *Lee* (S.C.), 38 S. E. 914.
Jerome v. *United States,* 318 U. S. 100.

Even if it be asusmed, *arguendo,* that this Fleeing Witness provision in Subsection 2 of the Fugitive Felon Act is constitutional, nevertheless the State of Michigan statute on which the state criminal proceeding is based, is contrary to the Fourteenth Amendment to the Federal Constitution. The said State criminal proceeding lacks all legal basis for its support.

IV.

It is apparent on the face of the State warrant charging a conspiracy between bribe takers and bribe givers that it is void. Hence there are no criminal proceedings in which a felony is charged.

The one-man juror warrant in this record shows on its face that it charges a conspiracy between bribe givers and bribe takers to obstruct the passage of a certain bill in the State Legislature. In the giving and the taking of bribes there must be plurality of parties and concert of action, both of which are necessary for the substantive crime of

giving bribes for which punishment is provided in Section 28.312 Michigan Statutes Annotated for the bribe givers and both of which are necessary for receiving bribes for which punishment is provided in Section 28.313, Michigan Statutes Annotated for the bribe receivers.

There are cited in the petition (Ante, pp. 13, 14), and need not be again cited in this brief, cases in the lower Federal courts, cases from State courts, and opinions of text-book writers to the effect that where plurality of parties and concert of action are required, as in bribery, adultery, and a few other limited instances, for the consummation of the substantive crime, the prosecutors may not substitute the crime of conspiracy for the statutory substantive crime. Also, there have been cited in the petition at least two opinions of this Court wherein the existence of the rule is recognized.

While referring to some of the cases which petitioner had cited in his brief in the Court below, the Court rejected their applicability and stated that "Bribery was only a part of the scheme concocted by the conspirators to defeat the proposed legislation. We think, therefore, that the case falls within the principles applied in *United States* v. *Glasser*, 116 Fed. (2nd) 690, 696 (C. C. A. 7); and in *United States* v. *Manton*, 107 F. (2nd) 834, 839 (C. C. A. 2)." (R. 110).

We state here categorically that both Sections 28.312 and 28.313, Michigan Statutes Annotated, relating to the bribery of public officers in Michigan—as well as Sections 199 and 200, Title 18, U. C. Code, relating to the bribery of members of the Senate and House of Representatives of the United States Congress—contemplate and require that the bribes be given and received for the purpose of influencing the passage or defeat of legislation or the wrongful performance of other official acts by the members of the legislative body. The leading case of *United States* v. *Dietrich*, 126 Fed. 664, is precisely a case where the conspiracy "concocted" was the giving and receiving of a bribe

to cause the United States Senator to bring about the appointment of the giver of the bribe as a postmaster, that is, performance of wrongful official action. In that case the crime of conspiracy was held not to exist even under the specific Federal Conspiracy Statute, Title 18, Sec. 88, U. S. Code, Dietrich having been indicted under the substantive bribery statute. *United States* v. *Dietrich,* 126 Fed. 659.

With all due deference to the court below, the adjudicated cases cited in the paragraph numbered (2) in the opinion (R. 109), cannot be distinguished from the case attempted to be made in this State warrant, constituting the basis of the criminal proceeding, wherein it is claimed the testimony of the petitioner is wanted. With equal deference, the *Glasser* and *Manton* cases cited in the lower court's opinion, as well as the subsequently cited *O'Leary* cases, have no bearing whatever on the issue whether there can be a conspiracy between bribe givers and bribe takers to influence legislation.

The opinion in the *Manton* case, p. 837, shows that the indictment charged a violation of Title 18, Sections 88 and 241, U. S. Code, printed in the margin of that opinion. Section 88 prohibited a conspiracy of two or more persons either to commit any offense against the United States or to defraud the United States. Section 241 prohibited the corruption of justice. Bribes were used for the purpose of accomplishing the substantive crimes of conspiracy specifically provided by statute, but the specific statutory offenses punishable by Sections 28.312 and 28.313, Michigan Statutes Annotated, were not charged in the State warrant. In this material respect the warrant in this case differs from the indictments in the *Manton, Glasser* and *O'Leary* cases.

This State warrant charges a conspiracy between bribe givers and bribe takers to influence legislation which was not provided for by any other statute of Michigan. This is particularly important in view of the conspiracy statutes

of Michigan (Chap. XXIV, Sections 28.348 to 28.354, Michigan Statutes Annotated) which do not include such a conspiracy as the one charged in these State proceedings.

The basis for the warrant is claimed to be the catch-all Section 22.773, Michigan Statutes Annotated, purporting to make felonies punishable by five years in prison or a fine of $2,500.00 of any indictable offense at the common law as to which punishment is not provided in some other statute.

The case of petitioner is wholly unlike the *Manton* case and this is made clear by the paragraph in Mr. Justice Sutherland's opinion commencing with the last paragraph in the first column on page 839, and ending in the second column on that page. Obviously a prosecution for conspiracy to commit any offense against the United States, including defrauding them or for the obstruction of justice under specific conspiracy statutes could not be defeated except in a case of conspiracy of bribe givers and bribe receivers to influence legislation, by a showing that bribes had been given and received as an inducement to commit the *substantive conspiracy offense*. It is equally obvious that there may not be a prosecution under such a general statute, merely referring to "any indictable offense at the common law", of a conspiracy between givers and receivers of bribes for the purpose of obstructing legislation when the substantive crimes of giving bribes and receiving bribes for influencing official action are specifically provided for by statute under which this warrant was not issued. Also, when, as hereinbefore shown, conspiracies such as charged in this warrant are not indictable offenses at the common law.

No astuteness whatever is required to understand that this warrant attempts to initiate a prosecution for conspiracy where the acts of the conspirators were quite different—the legislators to receive bribes while that of the other parties were to give bribes. A conspiracy to obstruct legislation was not even known to the common law, much

less was it an indictable felony thereunder, and it is not an indictable offense under the specific Michigan Conspiracy Statute, Chapter XXIV, Vol. 24, pp. 573, 576, Michigan Statutes Annotated, *supra*.

The *Glasser* and *O'Leary* cases relied upon by the court below are likewise not in point. They respectively concerned indictments under Title 18, Section 88, U. S. Code, of conspirators to defraud the United States. There again the indictments were laid under a specific statute forbidding such particular conspiracy offenses. We repeat that in the case of petitioner, who was himself named both as a co-conspirator and a co-defendant in the State warrant, the warrant was not laid under the substantive statutes of Michigan making it an offense to give bribes in an effort to influence official action of members of the legislature and under the substantive statute making it an offense to receive bribes in return for influence over official action.

On the contrary, instead of having a specific statute, as in the *Manton*, *Glasser* and *O'Leary* cases on which to lay the indictments, the grand juror ignored the specific statutes, punishing respectively individual givers and receivers of bribes, and attempted to include both the givers and the receivers of bribes in one conspiracy warrant for which there is no statute in Michigan except the general terms of the above referred to statute fixing punishment for all offenses indictable at common law for which no punishment had been expressly provided by other state statute—a State statute, incidentally, in conflict with the Fourteenth Amendment because of its indefiniteness and uncertainty. Also, that statute is not applicable because, as above stated, a conspiracy to obstruct legislation and a conspiracy between bribe givers and bribe takers to do so were unknown at the common law.

The case of *United States* v. *Holte*, 236 U. S. 140, 145, cited by the court below was a case which had been appealed by the United States and no appearance made by the appellee. The question there was whether a woman

could be a conspirator for her own transportation in interstate commerce for prostitution within the terms of what is now Title 18, Section 88, U. S. Code, also involved in the *Manton* and *Glasser* cases. The majority opinion does contain the language of the divided court, which the court below quoted therefrom, but it also contains the ignored additional language that:

> "Therefore the decisions that it is impossible to turn the concurrence necessary to effect certain crimes such as bigamy or duelling into a conspiracy to commit them do not apply."

The Circuit Court of Appeals for the Seventh Circuit in the *O'Leary* cases, 53 Fed. (2) 956, 56 id. 515, apparently did not give any attention to the language just quoted from the majority opinion in *United States* v. *Holte* and none to the language of this Court in *United States* v. *Katz*, 271 U. S. 354, as follows:

> "The overt act charged in each indictment was the sale of whiskey by one defendant to the other. This is an offense under the National Prohibition Act; but as defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity. Compare *United States* v. *New York C. & H. R. R. Co.*, 146 Fed. 298; *United States* v. *Dietrich*, 126 Fed. 664; *Vannata* v. *United States*, 289 Fed. 424, 427. This embarrassment could be avoided in an indictment for a criminal conspiracy only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion. See *Chadwick* v. *United States*, 141 Fed. 225."

And compare therewith the corresponding language of this Court in *Gebbardi* v. *United States*, 287 U. S. 112, 121-122.

Incidentally the *Chadwick* case cited in the above quoted extract from the *Katz* opinion was decided by this Sixth United States Circuit Court of Appeals and it distinguished therefrom the *Dietrich* case and pointed out that the check could have been certified by an officer of the bank without the concurrence of any one and that that fact took the case outside of the rule which forbids an indictment for conspiracy where a plurality of agents is logically necessary to complete the substantive crime which it was the object of the conspiracy to commit. A fraud on the United States could have been committed in the *Glasser* and *O'Leary* cases without the concurrence of any other party and then, too, specific Federal statutes provided for conspiracy indictments. So, also, may justice be obstructed by one party, as in the *Manton* case, but a bribe cannot be given and received by the same party nor may a party agree with himself to obstruct and defeat legislation, any more than he could buy from himself and sell to himself as recognized in the *Katz* case.

By way of summary of this point, it is the petitioner's position that the courts below committed reversible error in holding that there was a criminal proceeding pending in Ingham County, Michigan, in which a felony was charged as alleged in the indictment and as necessary to sustain a conviction under Subsection 2 of Title 18, Section 408(e), U. S. Code, otherwise known as the Fugitive Felon Act, because the specific Michigan Conspiracy Statute does not include conspiracies between bribe givers and bribe takers nor conspiracies to obstruct legislation. The drawer of the warrant disregarded the two State statutes respectively prohibiting the substantive crimes of giving bribes and prohibiting the receiving of bribes for the purpose of influencing official action on bills before the State Legislature and the Governor. In lieu of proceeding thereunder separately against givers of bribes and receivers of bribes, said drawer of the warrant attempted to proceed by one conspiracy action against both and all of the givers and the receivers

of bribes. In doing so, the warrant was rendered invalid (1) because of the Wharton Rule applied in the *Dietrich* and other similar cases and (2) because the conspiracies charged are not indictable conspiracies at the common law as hereinbefore shown.

Consequently, the criminal proceeding did not charge a felony and the indictment should have been dismissed in accordance with the motion therefor.

At least, the confusion is such in the lower courts on the point whether there may or may not be a conspiracy between bribe givers and bribe takers—represented by the *O'Leary* case in the Seventh Circuit and by this case in the Sixth Circuit and on the other hand by the *Dietrich* case, and the cases of *United States* v. *Sager*, 49 Fed. (2) 727 and *United States* v. *Zeuli*, 137 Fed. (2) 845 in the Second Circuit—and the seeming confusion is such as to what was intended by the language quoted by the court below from *United States* v. *Holte*, as compared with the quotation herein from the *Katz* case, that certiorari should be allowed and the doubts resolved which have created such confusion.

V.

In view of the requirements of the Fifth and Sixth Amendments to the Constitution of the United States, a federal criminal statute, such as the Fugitive Felon Act, may not validly incorporate State criminal statutes as subsection 2 of the said Fugitive Felon Act attempts to do.

With reference to some of the authorities concerning the necessity for definiteness and certainty in criminal statutes in America, we have cited a number of opinions of this court under Reason No. II for granting the petition. They need not be again cited here. Subsection 2 of the Fugitive Felon Act fails to meet the test of such cases.

The word "felony" as used in both Subsection 2 of the Fugitive Felon Act and in the State of Michigan statute on the alleged basis of which this State warrant was issued is

simply descriptive, only, of the punishment meted out to persons convicted of numerous crimes.

Under Title 18, Section 541, U. S. Code, the word "felony" means "all offenses which may be punished by death or imprisonment for a term exceeding one year." There are a great many such crimes, including murder, robbery, defrauding the United States, etc., etc.

This State statute (Section 28.773) contains its own definition of "felony", namely, "all indictable offenses at the common law, for the punishment of which no provision is expressly made by any statute of this State, shall be * * * a felony." What are such offenses may be determined, only, by taking all indictable and punishable offenses under Michigan statutes and comparing therewith all indictable offenses at the common law, whether misdemeanors or felonies or even petty offenses.

As hereinbefore stated, this Subsection 2 of the Fugitive Felon Act, by the use of the generic term "felony" which, under both the common law and most certainly under Federal statutes and statutes of the several 48 States, territories and possessions, applies to many crimes, attempts to incorporate therein for the purpose of making a Federal offense, the various and sundry crimes, whose names are legion, whether of the United States or of the several States, territories and possessions.

As if this were not bad enough, this petitioner has been indicted, tried, convicted, and is now serving sentence because he fled the State of Michigan and refused to testify in a case wherein it is claimed that the "felony" charged in the State criminal proceeding is one included in a State statute which itself defines a "felony", for the purpose thereof, as being "any indictable offense at the common law" for which punishment is not expressly provided in some other State statute. Moreover, the conspiracy offenses charged in the State proceedings are not indictable offenses at the common law. (Ante 26, 35.)

This Subsection 2 does not define the crime which must be charged in the criminal proceedings in the place from

which the accused fled to avoid testifying, as does Subsection 1 of the same act in providing punishment for criminals fleeing a place to avoid punishment there for having committed the specifically named crimes. Why the certainty exists as to fleeing criminals and not as to fleeing witnesses is fully shown by the legislative history of the Act. (See Appendix "A" hereto.)

The petitioner could not turn to the State statute under which the criminal proceeding was pending to determine whether the conspiracy crime charged therein was a felony. In this particular instance, the State statute simply referred the petitioner to the many volumes of statutes of the State of Michigan and to the common law, "a comprehensive law library", to borrow the language of the majority opinion in the *Screws* case, to determine whether a felony was charged in the State warrant.

The court below stated that the petitioner before commencing his travel consulted "an attorney, Seymour Person" as to whether the State could compel petitioner's return from the District of Columbia and was assured that "he could not be removed" (R. 106). Reference to the current edition of *Who's Who in America*, page 1850, shows Mr. Person to be a former member of Congress and a lawyer of long experience. If Mr. Person did give the petitioner such advice, there is to be remembered the above quoted statement of the Supreme Court of the State of Michigan that the question was "obscure if not insoluble" whether a certain crime was a "crime at common law". If Holmes, Holdsworth, and Wright are to be believed, it is clear that the alleged conspiracy charged in the indictment is not an indictable offense at the common law and Mr. Person was thus in good company!

As recently as *Jerome* v. *United States*, 318 U. S. 101, 108, this Court pointed out something of what was required in a Federal criminal statute to incorporate State law by reference. With respect to the so-called Assimilated Crime Acts, see *United States* v. *Paul*, 6 Peters, 141, 143 and

Franklin v. *United States,* 216 U. S. 559, in a footnote to which numerous such statutes are quoted. These Federal assimilated crime statutes incorporate as of the date of their respective enactments, State criminal laws then in force to be applied over Federal reservations within such State or States without which State law would otherwise have no force or effect in the respective reservations. These Assimilated Crime Statutes do not even leave it within the power of the State legislatures to change their State statutes so far as the changes becoming effective in the Government reservations is concerned, much less they do not leave it to the discretion of a prosecuting attorney or a one-man grand juror to charge a crime in a State proceeding of such a character as to make it possible for Federal prosecuting attorneys to convict a fleeing witness with intent to avoid testifying in such State case. See the observations of the court in *United States* v. *Brandenburg,* last paragraph on page 660. See also the language of this court in *Jerome* v. *United States,* p. 107. As a matter of fact, no such delegation of legislative authority could constitutionally be made by Congress to State legislatures and State prosecuting authorities. Compare *Schechter* v. *United States,* 295 U. S. 495; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388.

The Court below makes much of the fact (R. 107, 108) that the substantive statutes of Michigan prohibiting the giving of bribes and the receiving of bribes (Sections 28.312 and 28.313 MSA quoted in the margin of the petition, Ante pp. 12, 13) define as felonies the giving of bribes and the receiving of bribes. And so they do. But the criminal proceeding in this case, pending in Ingham County, Michigan, was not a proceeding under these two statutes, or either of them, as is obvious from the terms of the State warrant charging a conspiracy between bribe givers and bribe takers to influence legislation. These two statutes do not provide for the crime of conspiracy to bribe and particularly a conspiracy between givers and receivers of bribes—which

if a crime at all, is a crime separate and distinct crime from the substantive crime of giving bribes and the substantive crime of receiving bribes. *United States* v. *Rabinowich*, 238 U. S. 78; *Braverman* v. *United States*, 317 U. S. 49. Therefore, such definitions are wholly immaterial to the issue here concerning an entirely different alleged crime.

As hereinbefore stated, there is no Michigan conspiracy statute establishing the crime of a conspiracy between givers and receivers of bribes; the warrant is attempted to be based on the general Michigan statute, hereinbefore quoted (Section 28.773), which purports to make felonies of all indictable offenses at the common law for which punishment is not expressly provided in some other State statute. Some crimes of conspiracy were misdemeanor at common law but a conspiracy to obstruct legislation between bribe givers and bribe takers for this purpose was unknown at common law. In any event, if the giving of a bribe and the receiving of a bribe are separate offenses, as they undoubtedly are, two or more parties committing separate offenses could not be joined in one criminal proceeding for the two substantive offenses. *McElroy* v. *United States*, 164 U. S. 96.

If this warrant charged that the defendants gave bribes or that they received bribes in violation of Section 28.312 of the State Statutes Annotated, in the one case, or Section 28.313 of the same statutes, in the other case, a different situation would be presented. But the warrant did not do either of these things. It charged some of the defendants with giving the bribes and it charged the remainder of the defendants with receiving the bribes and it further charged that same were done as a conspiracy to influence legislation.

If the conspiracy charged is one to influence legislation or one between bribe givers and receivers, then it was not an indictable offense at the common law within the terms of the State statute, Section 28.773. Also, if the conspiracy charged is one between givers and receivers of bribes, then it fails for reasons hereinbefore stated that where statutes

provide for the punishment of the substantive crimes of either giving or receiving bribes, requiring plurality of parties and concert of action to commit the substantive crimes, the givers and the receivers of the bribes cannot be joined in one conspiracy proceeding, particularly in the absence of a statute specifically authorizing such a conspiracy proceeding.

In either event, the criminal proceeding pending in Ingham County, Michigan, as described in the indictment of petitioner, is void. And also for an additional reason that no Federal criminal statute may by reference incorporate a State criminal statute which in turn requires reference to a complete law library of the common law and of the accumulated volumes of State statutes and decisions of the courts interpreting the same in order to determine the exact offense which the State and Federal statutes intended to punish. (Ante, pp. 35-38.)

VI.

There was no criminal proceeding pending in the Circuit Court for Ingham County as charged in the indictment.

The material issue here is not whether the Constitution of the United States "makes the grand jury a part of the Judicial process" as the court below (R. 113) quoted from *Cobbledick* v. *United States,* 309 U. S. 323, 327, or whether a grand jury proceeding is a "judicial inquiry of the most ancient lineage" as it quoted from *Hale* v. *Henkel,* 201 U. S. 43.

On the contrary, the issue here is whether a specific case named in the indictment, namely, *State of Michigan* v. *Simeon D. Den Uyl et al.,* was in fact pending in the Circuit Court for the County of Ingham, Michigan, and if so, whether it charged a felony as required by the terms of the witness Subsection 2 of the Fugitive Felon Act.

In determining such question, resort obviously must be had to the Constitution of Michigan and to the Statutes of

that State and not to the Constitution of the United States and statutes pursuant thereto.

The warrant itself shows on its face that it resulted from a complaint filed by the Attorney General of Michigan which is referred to therein (R. 6). Section 28.443 of the Michigan Statutes Annotated, provides that upon such a complaint any judge or justice of the peace, police judge or judge of a court of record may investigate suspected offenses and Section 28.944 of the same statutes provides that:

> "If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. * * *"

When the warrant has been issued and the person or persons brought before the one-man grand juror, it is provided in Section 28.919, Michigan Statutes Annotated that:

> "The state and the accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal cases and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination."

As shown by the record, after the warrant was issued and the several defendants named therein whom the sheriff, etc., were ordered to arrest (R. 10), but not including petitioner, though he had been named as a co-conspirator and a co-defendant, had been brought before the one-man grand juror, they demanded a preliminary examination as provided in the statute last quoted. The matter was assigned

to another circuit judge to act as examining magistrate (R. 39). That examination has not been completed. Upon completion thereof, it is provided in Sections 28.931 and 28.933, Michigan Statutes Annotated, that:

> "If it shall appear to the magistrate upon examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate upon such examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith, said magistrate *shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause for trial.*" (Italics mine.)
>
> "All examinations and recognizances taken by the magistrate pursuant to any provisions of this chapter, shall be forthwith certified and returned by him to the clerk of the court before which the party charged is bound to appear, and if such magistrate shall refuse or neglect to return the same, he may be compelled forthwith by rule of the court, and in case of disobedience he may be proceeded against by attachment as for a contempt."

Since the preliminary examination had not been completed by the examining magistrate, and has not yet been completed, the defendants named in the warrant have neither been discharged nor bound over for trial in the Circuit Court for Ingham County, Michigan. Necessarily, the examining magistrate has not certified and returned to the clerk of that court the examinations and recognizances taken by the said examining magistrate.

Thus the testimony of the Circuit Court Clerk for Ingham County that no such case as *State of Michigan* v. *Simeon D. Den Uyl et al.*, was docketed on the records of his office (R. 72, 76), is perfectly consistent with the above quoted Michigan statutes governing the procedure in the case of one-man grand jury warrants. Having been served with a sub-

poena duces tecum to produce the records of his office concerning any such case of *State of Michigan* v. *Den Uyl et al.*, the clerk appeared without such records and testified as shown by the record here.

It so happens that the county seat of Ingham County is at Mason, Michigan, where is maintained the office of the Clerk of the Circuit Court. Lansing is in the same county and the Circuit Court has a branch office there, in charge of an assistant clerk, in which there is a safe or vault, to which the grand juror and the prosecuting attorneys had access (R. 76). Apparently a few papers were contained therein pertaining to the grand jury warrant, including Government Exhibit 8, being a stipulation between the prosecutors and attorneys for the defendants named in the grand jury warrant (R. 75, 76) for an extension of time.

The placing of papers in a vault in the office of a clerk of a court of record is not the equivalent of placing a case in the court of record and it is quite obvious that Sections 28.919, 28.931 and 28.933, Michigan Statutes Annotated, specifically provide how, and in what manner a criminal proceeding arising out of a one-man grand jury warrant may get into such a court of record.

It is not until after the examining magistrate has completed his examination and bound the defendants over for trial in the circuit court, or other court of record, and has certified the examinations and recognizances and sent the same to the clerk of that court that the case is actually in the said court.

Though expressly requested to charge that there was no such case as *State of Michigan* v. *Simeon D. Den Uyl, et al.*, pending in the Circuit Court for Ingham County, Michigan, in which a felony was charged (R. 89, 90, Pars. XXIII, XXVI), the trial court refused to give the charge. On the contrary, the trial court charged the jury:

> "* * * that on August 25, 1946, there was a criminal proceeding pending in the State of Michigan which proceeding meets the description of the one described

> in the indictment, and I charge you further that in such proceeding the commission of a felony is charged (R. 19)."

This we submit constituted reversible error. Not only do the above quoted Sections 28.944, 28.919, 28.931 and 28.933, Michigan Statutes Annotated, make it clear, on the basis of the admitted facts, that no such case was pending in the Circuit Court for the County of Ingham, Michigan, as described in the indictment but the fact of such pending criminal proceeding in that court is specifically denied by the clerk of the court, who could not, and did not, produce any records to that effect in response to the subpoena ducus tecum. It is apparent that the trial judge's instruction was based on the statements of Judge Coash in his testimony. Judge Coash seemed to have assumed because he held the office of Circuit Judge for Ingham County that made a case before him as a one-man grand jury in the Circuit Court for Ingham County. But such an assumption is in error under the specific Michigan statutes to which we have referred and under general principles of law.

This court, in *Todd* v. *United States,* 158 U. S. 278, which was a conspiracy to intimidate witnesses before a Commissioner of the Circuit Court of the United States, held that such a conspiracy was not then a crime against the United States, saying:

> "That a commissioner is not a judge of a court of the United States is apparent and conceded. He is simply an officer of the Circuit Court appointed and removable by the court. Rev. Stat. 627. *Ex parte Hennen,* 38 U. S. 13 Peters 230; *United States* v. *Allred,* ante, p. 273. A preliminary examination before him is not a proceeding in the court which appointed him, or of any court of the United States. Such an examination may be had not merely before a commissioner, but also before any justice or judge of the United States, or before any chancellor, judge of a state court, mayor of a city, justice of the peace, or other state magistrate. Rev. Stat. 1014. And it cannot be pretended that one

> of those state officers while conducting a preliminary investigation is holding a court of the United States. Technically we speak of an examining magistrate and not an examining court. * * * "

The court in that case quoted with approval an extract from an opinion of Mr. Justice Story in *United States* v. *Clark,* 1 Gall. 497, wherein it was stated that:

> " 'A court is not a judge, nor a judge a court. A judge is a public officer, who by virtue of his office is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law.' "

In dismissing the indictment in *Todd et al.* v. *United States* because it was fatally defective in attempting to make a "court" of a proceeding before a commissioner or examining magistrate, this Court plainly and unequivocably stated an elementary rule of interpretation of criminal statutes as follows:

> "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under a statute unless clearly within its terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute.' *United States* v. *Lacher,* 134 U. S. 624. Enlich, Interpretation of Statutes, Sec. 329; Pomeroy's Sedgwick on Statutory and Constitution Construction (2nd ed.) 280."

The examining magistrate in Michigan is simply that and nothing more. The fact that he may hold office as a justice of the peace, police judge, circuit court judge, or a justice of the State Supreme Court does not make the proceeding one in a court, much less a particular court. As a matter of fact, the Supreme Court of Michigan has held that the examining magistrate may certify a case for trial in some

other court than that of which he may be a judge. See *People* v. *Ewald*, 248 Mich. 678.

Therefore, the indictment in this case is as fatally defective as was the indictment in the *Todd* case and the instruction of the trial court to the jury is as clearly erroneous as it was fatal to petitioner.

CONCLUSION.

It is submitted that nowhere in the Constitution of the United States, either expressly or impliedly, may there be found legislative power for the enactment of Subsection 2 of the Fugitive Felon Act for the punishment by the United States of witnesses who travel in interstate commerce to avoid giving testimony in such a proceeding as is described in the indictment in this case. That, at least, sufficient showing has been made in this respect that this Court should grant certiorari and advance the case for early argument to the end that the many issues involved in this case of first impression may be heard and determined in the interest of an orderly and proper administration of justice, bail being authorized for the petitioner in the meanwhile.

Respectfully submitted,

O. R. McGuire,
Attorney for Petitioner.

APPENDIX "A".

Legislative History of the Statute.

(1)

Changes in the Bill on Legislative Passage.

The attempt to accomplish the purpose of making it a Federal crime for a witness to flee a State jurisdiction to avoid giving testimony in a criminal proceeding pending in a State court in which a felony is charged, resulted in vigorous opposition.

This Statute originated as Senate Bill No. 2253, which passed the Senate on March 29, 1934, in the words and figures as stated in a footnote below.[1]

The Senate Bill sought to prohibit the fleeing interstate of both persons with intent to avoid prosecution for all felonies in State courts and persons with intent to avoid giving testimony in all felony cases in State courts. It provided that the same penalties should be meted out to both classes of persons. This attempt to impose the same penalties to both classes of fugitives has been made the subject of our sixth reason for granting the writ and is discussed *ante*, pages 14 to 15.

The Judiciary Committee of the House of Representatives reported the Senate Bill with the following amendments:

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[1] "That it shall be unlawful for any person to flee from any State, Territory, or possession of the United States, or the District of Columbia, with intent, either (1) to avoid prosecution for a felony under the laws of the place from which he flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of a felony is charged. Any person who violates the provisions of this Act shall, upon conviction thereof, be punished by a fine of not more than $5000 or by imprisonment for not longer than 5 years, or by both such fine and imprisonment. Violations of this Act may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed." (78 Cong. Rec. 5737.)

"On page 1, line 5, after the word 'Columbia,' insert to another State, Territory, or the District of Columbia or to a foreign country.'

"Page 1, line 7, at the beginning of the line, strike out 'either (1)' and after the word 'for' strike out 'felony' and insert 'murder, kidnapping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence or attempt to commit any of the foregoing.'

"Page 2, line 1, after the word 'flees' strike out 'or (2) to avoid the giving of testimony in any criminal proceeding in such place in which the commission of a felony is charged.'

"Amend the title so as to read: 'An Act making it unlawful for any person to flee from one State to another for the purpose of avoiding prosecution in certain cases.' "[2]

The bill, with the House Judiciary Amendments, was passed by the House of Representatives.[3] It then went to conference between the managers of the two houses and therefrom it emerged in the exact language quoted at page 6 of this petition; that is, with subsection (1) relating to persons fleeing the State jurisdictions to avoid prosecution for crime being in the terms reported by the House Judiciary Committee; subsection (2) relating to fleeing witness to avoid giving testimony being in the language first adopted by the Senate and which the House of Representatives had omitted; and with the words "move or travel in interstate commerce" substituted for the word "flee."[4]

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[2] 78 Con. Rec. 8129.

[3] id.

[4] The conference report, signed by the Managers of both Houses of Congress, is published in 78 Cong. Rec. 8777 and is, in pertinent part, as follows:

"That the House recede from its amendments numbered 2, 4, and amendment to the title.

"That the Senate recede from its disagreement to the amendment of the House numbered 3; and agree to the same.

"Amendment numbered 1. That the Senate recede from its

(2)

Discussions on the Floors of Congress.

The report from the House Judiciary Committee does not state why there was eliminated from the Senate Bill the language of subsection "(2)" thereof, to wit, "to avoid giving testimony in any criminal proceedings in such place in which the commission of a felony is charged" nor why there was substituted in subsection "(1)" for the word "felony" the specific crimes above quoted from the House proceedings and as now contained in the statute.[5]

However, upon consideration in the House, the following questions were asked and answered. Mr. Sumners being the then learned Chairman of the Committee on the Judiciary of the House:

> "Mr. Cochran of Missouri. In certain cities rackateers have forced witnesses to leave the community and even forced them to leave the State, in order to prevent them from appearing at the prosecution of a defendant. Does not the gentleman feel it would be advisable to cover witnesses in this bill? It would help the Department a great deal.
>
> "Mr. Lloyd. Will the gentleman yield?
>
> "Mr. Sumners. I yield.
>
> "Mr. Lloyd. Will the gentleman be so good as to explain how the Federal government can have any jurisdiction over witnesses in a State prosecution?
>
> "Mr. Cochran of Missouri. The only theory of existing law I could advance would be that individuals had entered into a conspiracy to prevent the United States from prosecuting one who had violated its laws. To me protecting witnesses is very important. I thought the Department desired such a provision.

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disagreement to the amendment of the House Number 1 and agree to the same with an amendment as follows:

"In lieu of the matter proposed to be inserted by the House amendment, strike out on page 1, line 3 of the Senate bill the word 'flee' and insert in lieu thereof 'move' or travel in interstate commerce'; and the House agree to the same."

[5] House Report No. 1458.

"Mr. Sumners of Texas. Mr. Speaker, I may say to the gentleman from Missouri that the witness aspect of the matter was included in the first bill; but after consideration by the Committee and mature consideration by the Department of Justice, the Department did not feel that they wanted to risk having the provision incorporated in the bill, and that is why it was taken out."[6]

After Mr. Sumners had made this statement to the effect that the Department of Justice did not want to risk the constitutionality of the bill by having the witness provision therein,[7] there was no further discussion of that provision in the House during passage of the amended bill, nor thereafer in the House when the Conference Report was submitted and adopted, restoring the said provision.

The provision in subsection "(2)" was debated more at length in the Senate. When the bill was on first passage in the Senate, the distinguished and learned Senator King of Utah, who had been a justice of its Supreme Court, objected thereto and said, among other things, that:

"We are assuming that the States are wholly impotent to deal with questions which properly arise under their authority. We are challenging the competency of the States to govern their own affairs. We are substituting a Federal criminal code for the criminal codes of the States."

"Referring to the bill which we are now discussing, making it unlawful for any person to flee from one State to another for the purpose of avoiding prosecution or the giving of testimony in certain cases, any State has the power to deal with these questions and to enact laws providing that any person charged with a felony who flees from a State shall be guilty of an

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[6] 78 Cong. Rec. 8129

[7] As to the importance of such legislative history and the availability thereof in interpreting a statute, see *Harrison* v. *Northern Trust Company*, 317 U. S. 476; *Richbourg Motor Co.* v. *United States*, 281 U. S. 528; *Wright* v. *Mountain Trust Bank*, 300 U. S. 440.

offense and be subject to prosecution therefor. Section 2 of the bill provides that if a witness, to avoid giving of testimony in any criminal proceedings, goes beyond the boundaries of the state, though perhaps the offense charged against the person is only a misdemeanor, he subjects himself to a fine of $5,000 and imprisonment not longer than five years.

"The State may pass a law declaring witnesses who seek to avoid testifying and flee the State may be punished.

"By this measure we are taking a position that the States are incompetent to deal with matters with which they have complete authority to deal and which are exclusively within their jurisdiction."[8]

After the submission to the Senate of the Conference Report on the very considerably amended bill, Senator King adhered to his position that the bill should not become law and said:

> "Mr. President, I shall not object to the consideration of this bill. I shall vote against it, however, because I believe it will be abused in administration. I doubt its constitutionality; and I have not any doubt on earth that in the hysteria now existing, and that which may follow, persons will be imposed upon, will be arretsed and prosecuted under Federal law where the facts and circumstances will not warrant it."[9]

The answering argument to Senator King was made by Senator Ashburst of Arizona to the effect that the proposed statute was necessary to combat the "gangster menace," saying:

> "I appreciate, as I believe we all do, the earnestness of purpose and the legal talent of the Senator from Utah (Mr. King); but when we reflect upon the present condition of affairs in this country and remember that there are, as I am reliably advised, more gangsters under arms in the United States at this hour than there

[8] 78 Cong. Rec. 5736-5737.

[9] 78 Cong. Rec. 5737. This case illustrates the correctness of Senator King's prophecy.

are men under arms in the United States Army, we realize the necessity for taking drastic measures to deal with gangsters.

"These gangsters are equipped with machine guns, sawed-off shot-guns, and other lethal weapons. They have, in large part, no consideration for human life; and society, therefore, in order to survive must be bold and zealous; and we are required to bring into requisition every ounce of energy that we constitutionally may." [10]

The reason why there was rejected the amendment of the House of Representatives striking out the part thereof relating to witnesses was stated by Chairman Ashurst on the floor of the Senate as follows:

"It will be remembered that the Senator from New York (Mr. Copeland) and the Senator from Michigan (Mr. Vandenburg) served notice that they would oppose any report which struck from the bill the provisions adopted by the Senate as to penalizing persons who flee the jurisdiction of the courts and cross State lines in order to avoid giving testimony in criminal cases. That is the bill to which the able Senator from Montana (Mr. Wheeler) is opposed." [11]

Thus the legislative history of this statute shows that it was enacted into law in its present form over the combined objections of the Department of Justice, the House Judiciary Committee, and the opposition of Senators King and Wheeler, because the two laymen Senators, Copeland and Vandenburg, served notice that they would oppose the adoption of any report of the Conference Committee which left the witness provision out of the proposed statute.

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[10] 78 Cong. Rec. 5736.

[11] 78 Cong. Rec. 8857.

EXHIBIT "B".

COPY

THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

At a general term of the Circuit Court for the County of Ingham, continued and held at the Court Room in the City of Lansing, in said County, on Tuesday, May 23, 1944,

Present, Hon. Leland W. Carr, Circuit Judge.

Court opened for business in due form at nine o'clock A. M.

In the Matter of the Complaint of Herbert J. Rushton, Attorney General for the State of Michigan for a Judicial investigation Concerning Certain Criminal Offenses.

Judge Carr.

Now comes Kim Sigler, Special Prosecutor and Assistant Prosecuting Attorney of Ingham County, and moves the Court that Charles Hemans, a witness before the Honorable Leland W. Carr conducting an inquiry in the County of Ingham by authority of Sections 17217 and 17218 of the Michigan Compiled Laws of 1929, be required to answer the following questions, the answers to which might tend to incriminate him, the said Charles Hemans, and that this Court grant to the said Charles Hemans immunity from prosecution, as provided in Section 17220 of the Compiled Laws of 1929, so that he, Charles Hemans, shall not hereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him, the said Charles Hemans, namely:

Question No. 1

Did you, during the legislative session of 1939 for the State of Michigan, receive money from Julian Thompson, John Hancock and Armand Robichaud, individually and in behalf of themselves and George Omacht and Abraham Cooper, to be used for the pur-

pose of influencing members of the legislature for the State of Michigan in taking action on the bill or bills referred to in the warrant issued by the Hon. Leland W. Carr on May 2, 1944, charging said persons named therein with common law conspiracy, with which said warrant you are familiar?

QUESTION No. 2

Did you out of the money so received, or promised to you by said persons, make payments to, and also make promises to pay, certain members of the legislature, namely Francis J. Nowak, Edward J. Walsh, Earl C. Gallagher, William C. Buckley, Ernest G. Nagel, Walter N. Stockfish, Leo J. Wilkowski, Charles C. Diggs and D. Stephen Benzie, to influence their action of said bill or bills.

KIM SIGLER,

Special Prosecutor and Assistant Prosecuting Attorney of Ingham.

I hereby grant the above Motion and grant full Immunity to the said Charles Hemans, as provided by law, and require him to answer the questions.

LELAND W. CARR,
Circuit Judge,

sitting as an Investigating Body, under Sections 17217 and 17218, of the Compiled Laws of 1929 of the State of Michigan.

EXHIBIT "C".

COPY

WARRANT

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

STATE OF MICHIGAN, }
COUNTY OF INGHAM, } ss.:

TO THE SHERIFF OF INGHAM COUNTY, ANY OF THE MICHIGAN STATE POLICE, AND TO ALL POLICE OFFICERS IN THE STATE OF MICHIGAN, GREETING:

Whereas, upon an inquiry conducted under and in pursuance of Sections 17219 and 17218, and all sections of the Compiled Laws of Michigan for the year 1929, as amended, relative to the inquiries provided for under said sections of the Compiled Laws of 1929, before me, LOUIS E. COASH, one of the Judges of the Circuit Court for the County of Ingham in the matter entitled:

> "IN THE MATTER OF THE COMPLAINT OF HERBERT J. RUSHTON, ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, FOR A JUDICIAL INVESTIGATION CONCERNING CERTAIN OFFENSES"

there appears to me to be probable cause to suspect that heretofore, to-wit, on the 30th day of April, A. D. 1941, CHARLES F. HEMANS, did corruptly promise to GEORGE O. HARMA then and there a member of the House of Representatives of the State of Michigan after the election of the said GEORGE O. HARMA as a member of the said House of Representatives and after the said GEORGE O. HARMA had been qualified and taken his seat, certain money to-wit, Two Hundred Dollars ($200) lawful money of the United States of America, the intent and purpose of which was to influence the act, vote, opinion, decision and judgment of the said GEORGE O. HARMA on Senate Bill No. 17 of the 61st Michigan Legislature, regular Session of 1941, entitled:

"A bill to amend sections 1, 2, 3, 4, 6 and 9 of Act No. 301 of the Public Acts of 1939, entitled 'An act to provide for the imposition and the collection of a specific tax upon the ownership of intangible personal property; to provide for the disposition of the proceeds thereof; to prescribe the powers and duties of the state tax commission with respect thereto; to prescribe penalties; to make an appropriation to carry out the provisions of this act; and to repeal all acts and parts of acts inconsistent with the provisions of this act."

and divers other measures and bills then and there pending and which by law might be brought before him, GEORGE O. HARMA, in his public capacity in violation of Section 117 of Act 328 of the Public Acts of Michigan for the year 1931 as amended, and contrary to the form of the statute in such case made and provided and against the peace, dignity, safety and welfare of the People of the State of Michigan.

THEREFORE: In the name of the People of the State of Michigan, you, and each of you, are commanded forthwith to arrest the said CHARLES F. HARMA and bring him before me to be dealt with according to law.

Given under my hand and the seal of this Court at the City of Lansing, County of Ingham, on the 25th day of April, A. D. 1947.

(Signed) LOUIS E. COASH,
Circuit Judge acting under Sections 17217 and 17218 Compiled Laws of the State of Michigan for the year 1929 and acts amendatory thereto.

Following on Page 3 of Warrant:

RETURN OF OFFICER.

STATE OF MICHIGAN, }
COUNTY OF INGHAM, } ss.:

BY VIRTUE OF THE WITHIN WARRANT, to me directed, I hereby certify and return that I have taken the within named ..... whom I have before the HON. LOUIS E. COASH, the within named Circuit Judge, as I am within commanded.

.....
Officer.